IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
December 18, 2001 Session

HERSCHEL EDWIN LUNA v. GAF FIBERGLASS CORPORATION, ET AL.

Direct Appeal from the Circuit Court for Davidson County
No. 00C946 Carol Soloman, Judge

No. M2001-01155-WC-R3-CV - Mailed - January 31, 2002
Filed - May 9, 2002

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. In this appeal, the employer insists (1) the claim is barred by Tenn. Code Ann. § 50-6-203 and (2) the trial court's award of permanent partial disability benefits based on 100 percent hearing loss is excessive. As discussed below, the panel has concluded the judgment should be affirmed.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Circuit Court Affirmed.

JOE C. LOSER, JR., SP. J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, JR., J., and JAMES WEATHERFORD, SR. J., joined.

James H. Tucker, Jr., Nashville, Tennessee, for the appellants, GAF Fiberglass Corporation, Building Materials Manufacturing Corporation, Zurich Insurance Company

Ann Buntin Steiner, Nashville, Tennessee, for the appellee, Herschel Edwin Luna

MEMORANDUM OPINION

The employee or claimant, Luna, is 67 years old with no formal education but experience as a horse trainer, car washer, sharecropper and sausage sacker. He cannot read and write. He worked for the employer, GAF and its predecessor, for approximately thirty years until his retirement in 2000, operating a loud machine. He gradually developed hearing loss. Three years before his retirement, a personnel department employee, Mary Hall, told him he would be deaf in three years, apparently based on the results of hearing tests conducted by the employer over a period of years.

The claimant did not know the results of those tests and did not believe Ms. Hall. Ms. Hall is the workers' compensation administrator for the employer.

In June 1989, Ms. Hall told him his hearing loss could have been caused by a cold, sinus problems, medication, high blood pressure or background noises. However, the claimant did not notice any hearing loss until around six months before he retired. It is difficult to determine when the claimant first discovered his injury was work related. He did not miss any time from work because of it. The complaint was filed April 3, 2000.

One doctor estimated the claimant's loss of hearing to be 28 percent to the right ear and 66 percent to the left ear; another estimated binaural impairment to be 23 percent. The loss of hearing has not affected his ability to work. At the time of the trial, he was earning approximately two hundred dollars per week as a landscaper.

Upon the above summarized evidence, the trial court awarded, inter alia, permanent partial disability benefits based on 100 percent to both ears. Appellate review of findings of fact is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). Conclusions of law are subject to de novo review on appeal without any presumption of correctness. Nutt v. Champion Intern. Corp., 980 S.W.2d 365, 367 (Tenn. 1998).

This tribunal is not bound by the trial court's findings but instead conducts an independent examination of the record to determine where the preponderance lies. Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991). Where the trial judge has seen and heard the witnesses, especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must be accorded those circumstances on review, because it is the trial court that had the opportunity to observe the witnesses' demeanor and to hear the in-court testimony. Long v. Tri-Con Ind., Ltd., 996 S.W.2d 173, 178 (Tenn. 1999). The appellate tribunal, however, is as well situated to gauge the weight, worth and significance of deposition testimony as the trial judge. Walker v. Saturn Corp., 986 S.W.2d 204, 207 (Tenn. 1998).

The appellants contend the claim is time barred because the claimant was not diligent in discovering his injury and did not sue within one year after learning he was losing his hearing. An action by an employee to recover benefits for an accidental injury, other than an occupational disease, must be commenced within one year after the occurrence of the injury. Tenn. Code Ann. § 50-6-224(1). The running of the statute of limitations is suspended, however, until by reasonable care and diligence it is discoverable and apparent that a compensable injury has been sustained, for it has been held that it is the date on which the employee's disability manifests itself to a person of reasonable diligence - not the date of accident - which triggers the running of the statute of limitations for an accidental injury. Hibner v. St. Paul Mercury Ins. Co., 619 S.W.2d 109 (Tenn. 1981).

However, it has also been held that where a condition develops gradually over a period of time resulting in a definite, work-connected, unexpected, fortuitous injury, it is compensable as an injury by accident. Brown Shoe Co. v. Reed, 209 Tenn. 106, 350 S.W.2d 65 (1961). The date of injury for gradually occurring injuries is the date on which the claimant was forced to quit work because of the injury. Lawson v. Lear Seating Corp., 944 S.W.2d 340 (Tenn. 1997). As noted above, this claimant never quit working until his voluntary retirement less than one year prior to the commencement of this civil action. Voluntary retirement does not defeat an injured workers' right to compensation benefits. Mackie v. Young Sales Corp., 51 S.W.3d 554, 559 (Tenn. 2001). Because the claimant's injury is one that developed gradually, the Lawson and Mackie rules apply and the claim is not time barred.

The appellants next contend the award of permanent partial disability benefits is excessive. When an injured employee's partial disability is adjudged to be permanent, he is entitled to benefits based on a percentage of disability rather than the amount the employee is able to earn in his partially disabled condition. See Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452 (Tenn. 1988). The opinion of a qualified expert with respect to a claimant's clinical or physical impairment is a factor which the court will consider along with all other relevant facts and circumstances, but it is for the court to determine the percentage of the claimant's industrial disability. Miles v. Liberty Mut. Ins. Co., 795 S.W.2d 665, 666 (Tenn. 1990). The extent of an injured worker's vocational disability is a question of fact. Story v. Legion Ins. Co., 3 S.W.3d 450, 456 (Tenn. 1999). From a consideration of the pertinent factors, to the extent they were established by the proof, we cannot say the evidence preponderates against the trial court's finding as to the extent of Mr. Luna's disability.

The issues on appeal are resolved in favor of the appellee. The judgment of the trial court is therefore affirmed. Costs are taxed to the appellants.

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JOE C. LOSER, JR.

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

HERSCHEL EDWIN LUNA v. GAF FIBERGLASS CORPORATION, BUILDING MATERIALS MANUFACTURING CORPORATION, ZURICH INSURANCE COMPANY

Circuit Court for Davidson County
No. 00C946

No. M2001-01155-SC-WCM-CV - Filed - May 9, 2002

ORDER

This case is before the Court upon the motion for review filed by GAF Fiberglass Corporation, Building Materials Manufacturing Corporation, and Zurich Insurance Company pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to the appellants, for which execution may issue if necessary.

PER CURIAM